STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

NATIONAL WILDLIFE FEDERATION & UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

vs

Supreme Court
No. 121890

CLEVELAND CLIFFS IRON COMPANY & EMPIRE IRON MINING PARTNERSHIP,

Defendants-Appellants,

and

Court of Appeals
No. 232706

MICHIGAN DEPT OF ENVIRONMENTAL QUALITY, a Michigan Executive Agency and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants,

_____/

Marquette County Circuit Court
No. 00-037979-CE

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction of this case pursuant to MCR 7.301 and MCR 7.302. The Cleveland Cliffs Iron Company and Empire Iron Mining Partnership, the defendants in this litigation, sought leave to appeal or a peremptory reversal of the Court of Appeals decision of June 11, 2002, which reversed the trial court's January 20, 2001 order granting summary disposition in favor of defendants on the basis of their failure to show standing. The Court of Appeals reversed the trial court ruling on the basis that the Michigan Environmental Protection Act, MEPA, MCL 324.1701 et seq, entitles "any person to maintain an action" regardless of their showing the traditional "actual injury" requirement for standing. (Opinion, Michigan Court of Appeals No 232706, rel'd 6/11/02, 790a). In essence, the Court of Appeals ruled that MEPA can constitutionally authorize a litigant to bring a claim without satisfying any constitutional standing requirements as articulated by this Court in *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 740; 629 NW2d 900 (2001). The Court of Appeals rejected the defendants' contention that the *Lee* rationale requires a showing of actual injury as a matter of Michigan constitutional law and that the legislature is not entitled to abrogate these constitutionally-based separation-of-powers requirements of the Michigan Constitution. This Court granted the application for leave to appeal "limited to the issue whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726 (2001)." (Order, 7/3/03, 792a).

STATEMENT OF THE QUESTION PRESENTED

I.

CAN THE MICHIGAN LEGISLATURE CONFER BY STATUTE STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING AS RECOGNIZED BY THIS COURT IN *LEE v MACOMB COUNTY BOARD OF COMMISSIONERS*?

Defendants-Appellants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership answer "No."

Plaintiffs-Appellees answer "Yes."

The trial court answers "No."

The Court of Appeals answers "Yes."

STATEMENT OF FACTS

A. Facts Regarding The Empire Mine And The Permit For An Expansion That Was Issued By The MDEQ.

The Empire Mine is located in Palmer, Michigan. Palmer is situated approximately twenty miles southwest of Marquette, Michigan. Since the 1840's, iron mining has been the primary economic industry in the Palmer, Michigan region. The area provides the United States with processed iron ore that is used for the production of steel, a vital resource in our society (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶2, 183a).

There are only nine iron ore and pelletizing operations remaining in the United States, and the Empire Mine is one of the few large, modern facilities capable of producing lower cost iron pellets needed for the United States steel industry to remain competitive in the global marketplace (*Id.*). The operation of the Empire Mine has a significant influence on the economy of Marquette County and the surrounding areas (Defendants' Brief in Opposition to Plaintiffs' Motion For a Preliminary Injunction, Meier Affidavit, ¶3, 183a). The Empire Mine employs about one thousand union workers and contributes approximately $250 million per year to the regional economy in the form of wages and employee benefits, pension payments, local property taxes, and payments to local suppliers and vendors (*Id.*).

On or about October 27, 1999, the Empire Iron Mining Partnership submitted a 49-page Application for Permit to the MDEQ in connection with its planned expansion of the Empire Mine (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary

Injunction, Meier Affidavit, ¶4, 183a). Amongst other things, Empire's Application for Permit provided a comprehensive outline of the scope of the proposed project, including the unavoidable impact on the environment, and Empire's planned mitigation (*Id.*). The application covered six projects, to wit: Project One: Main North Rock Stockpile Expansion; Project Two: Northwest Rock Stockpile Expansion; Project Three: CD-V Pit Expansion and Perimeter Road Construction; Project Four: CD-I Perimeter Road Construction; Project Five: CD-II Pit Development and Perimeter Road Construction; and Project Six: CD-II Rock Stockpile Construction ["mine expansion projects"] (Defendants' Brief in Opposition to Plaintiffs' Motion For a Preliminary Injunction, Meier Affidavit, ¶4, 183a; and Minnes Affidavit, ¶4, 371a). As set forth in Empire's application, compensatory mitigation was provided for at the Republic Wetlands Preserve, a 615-acre wetland preserve development in Republic, Michigan (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶5, 184a).[1] In addition, Empire proposed the implementation of stream improvements and projects and watersheds and sub-watersheds in the area where the impact would occur.

On March 17, 2000, Empire received a letter from Ginny Pennala, MDEQ's Marquette district supervisor. There, upon indicating that the MDEQ had completed its review of Empire's application, Ms. Pennala referenced some concerns raised by the

[1]In their brief in opposition to plaintiffs' motion for a preliminary injunction, the defendants made the point that the compensatory mitigation would provide a significant gain in wetland acreage and functions and values in the area (Brief, p 3, 160a).

Environmental Protection Agency [EPA] (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶6, 184a). In response to the EPA's listing of concerns, Empire retained various environmental consultants. Empire hired those individuals to prepare and to develop an impact assessment for the impacted area.

On May 11, 2000, in response to the concerns previously raised by the EPA, Empire forwarded its Impact Assessment to the EPA (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶6, 184a).[2] The Impact Assessment was a 211-page comprehensive report. It discussed the environmental impact of the proposed Empire expansion on wetlands, wildlife, stream habitats/fisheries, ecological conditions, hydrology, water quality, and stream resources on Empire's property as well as resources located adjacent to the mining properties and resources located downstream of the mining expansion. (*Id.*).

On April 25, 2000, the MDEQ held a public hearing at the Tildon Township Hall in Marquette County (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶7, 185a). The purpose of the meeting was to enable the MDEQ to receive public comment regarding the permit application and the proposed expansion of the Empire Mine (*Id.*). MDEQ chose the location of the public

[2]Meier attached a copy of the executive summary and the table of contents from the Empire and Tildon's Mines Impact Assessment to the EPA as Exhibit D to his affidavit. (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, 319a)

meeting as the most appropriate site for the public hearing (*Id.*). In addition, the MDEQ received written comments for a thirty-day period following the public hearing. At no time during the comment period did the plaintiffs' environmental consultant, Christopher P. Grobbel, Ph.D., provide public or written comment.

On May 1, 2000, Edward Minnes, chief engineer of the Empire Iron Mining Partnership, and John Meier, Empire's district manger for environmental affairs, accompanied Tony DeFalco of the National Wildlife Federation on a tour of the Empire Mine and the proposed wetland and stream impact projects (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶8, 185a). The meeting was facilitated in an effort to address any specific concerns or objections that the National Wildlife Federation had to the mine expansion projects. (*Id.*). Mr. DeFalco did not assert any objections at the time of the tour (*Id.*). Likewise, Mr. DeFalco did not raise any objections or concerns during the public comment period following the MDEQ's public hearing held in connection with the issuance of the subject permit (*Id.*).

After reviewing the Impact Assessment, the EPA sent a letter to the MDEQ on June 9, 2000 (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶9, 185a).[3] Following receipt of the letter, Empire representatives met with MDEQ personnel in Marquette County to address the conditions raised by the EPA (*Id.*). On August 18, 2000, Meier submitted a revised mitigation plan

[3]The EPA's letter was attached as Exhibit E to Meier's affidavit. (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, 335a)

to the MDEQ (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶10, 185a). The revised mitigation plan reflected modifications made during the permitting process as a result of comments by the EPA and others.

On August 29, 2000, after Meier and Minnes met with MDEQ representatives in Marquette County to address the conditions raised by the EPA, the MDEQ issued Permit No. 99-3-163 in connection with the proposed Empire Mine expansion (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶11, 185a).[4] Simultaneously the MDEQ also published a notice of authorization which specifically authorized work on the six discrete projects identified in the permit application (*Id.*). The permit resolved all the issues raised by the EPA (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶11, 186a).

B. Procedural History Of The Contested Case Hearing.

On October 27, 2000, the plaintiffs filed a petition for a contested case hearing with the MDEQ. Empire sought permission to intervene in the administrative proceedings. The chief administrative law judge granted Empire's request on November

[4]As a result of comments received from the EPA and/or the public, MDEQ made several modifications from the permit application to the actual permit it issued (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶11, 186a). In particular, MDEQ reduced the amount of wetland acreage proposed to be filled while increasing the mitigation ratios for the creation of new wetlands (Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Meier Affidavit, ¶12, 186a).

20, 2000. Eventually, the chief administrative law judge ruled that the plaintiffs lacked standing to pursue the contested case proceeding and dismissed the matter. The plaintiffs appealed that matter to the Marquette County Circuit Court (No. 01-038485-AA). The circuit court upheld the March 16, 2001 opinion and order of the administrative law judge. The Court of Appeals later denied the plaintiffs' delayed application for leave to appeal. (Michigan Court of Appeals No. 238730).

C. Procedural History Of This Lawsuit.

In the meanwhile, the plaintiffs commenced this action on November 17, 2000, with the filing of a complaint and petition for interlocutory review; a motion for temporary restraining order and order to show cause why preliminary injunction should not issue or, alternatively, for stay; and a motion for immediate consideration.[5] Count I of the complaint included a petition for interlocutory review and a request for a stay. Count II asserted a claim under MEPA. The plaintiffs maintained that the defendants' conduct was likely to pollute, impair, or destroy natural resources (Complaint, ¶38, 16a) and further that defendants were engaging in expansion activities without final authorization, all of which provided sufficient evidence for the plaintiffs to believe that the defendants' conduct had or was likely to pollute, impair, or destroy water, wetlands, other natural resources, and the public trust sufficient to establish a prima facie case under MEPA (Complaint, ¶39, 16a). Accordingly, the plaintiffs sought equitable relief in

[5]On defendants' motion, the Ingham County Circuit Court subsequently transferred venue to Marquette County.

the form of a temporary restraining order and a preliminary injunction enjoining defendants from further mine expansion activity (Complaint, ¶45, 18a).

Cleveland Cliffs and Empire Mining opposed the plaintiffs' requested relief. They brought a motion to dismiss the petition for interlocutory review, and opposed the issuance of a preliminary injunction. Cleveland Cliffs and Empire Mining contended that, inasmuch as the plaintiffs lacked standing to assert a claim because they did not have a personal stake in the outcome of the lawsuit and because they failed to demonstrate any direct or injury in fact sufficient to confer standing, they were unable to demonstrate a substantial likelihood of success of prevailing on the merits of count II of their complaint. More particularly, the defendants charged that, at best, the plaintiffs only alleged potential environmental harms to their general use and enjoyment of the property surrounding the impact area and that such types of harms were insufficient as a matter of law to create standing under NREPA. So, too, the defendants averred that the affidavits supplied by the plaintiffs fell far short of establishing that the affiants had a personal and cognizable interest peculiar to them in the project's completion and thus that the alleged harm suffered by them was any different than that endured by the public as a whole.

Anticipating the plaintiffs' reliance upon the provisions of MEPA, specifically MCL 324.1701, as conferring universal standing, the defendants insisted that such an argument was without merit. They pointed out that it would be nonsensical and contrary to the standing requirements of state and federal law as well as the legislative intent underlying MEPA to confer jurisdiction upon any individual who merely asserted a

speculative or hypothetical environmental harm. In addition, the defendants urged the trial court not to abandon the traditional requirement that one must have a property or contract right to assert in order to have standing. All in all, the defendants contended that MEPA did not confer a grant of universal standing. The defendants sought to persuade the trial court to adhere to the rule that a person must have standing to assert a claim.

The plaintiffs grounded their standing argument on two bases: (1) the general rule of standing established by the Michigan Supreme Court and (2) MEPA, which, according to the plaintiffs' reading, provided standing to any legal entity who endeavored to protect the State's natural resources from pollution, impairment, or destruction. The plaintiffs took the position that they need not show a particularized injury in order to have standing to enforce MEPA because the legislature could and did confer standing without such a showing.

On January 5, 2001, the trial court entertained oral arguments on the plaintiffs' motion for a preliminary injunction. It issued an oral ruling at the conclusion of those proceedings, denying the plaintiffs' request for a preliminary injunction (Tr, 1/5/01, p 322, 779a). Noting the phraseology of the affidavits submitted by the plaintiffs, the trial court also declined to find that the plaintiffs possessed standing (Tr, 1/5/01, p 324, 781a). The trial court observed that anyone who took the time to go through the affidavits and to read them carefully would see that the phrase "I am concerned" appeared repeatedly without any stated basis in the affidavits for the affiants' expression of concern (Tr, 1/5/01, pp 324-325, 781a-782a). Thus, the trial court rejected the affidavits as a basis for conferring standing upon the plaintiffs (Tr, 1/5/01, p 325, 782a). With the individual

affiants lacking any standing, the trial court saw no way that the organizations of which they were members could have standing. (*Id.*). Partly because of its conclusions concerning the plaintiffs' lack of standing, the trial court decided that they did not have a substantial probability of success on the merits of their lawsuit and thus were not entitled to the requested preliminary injunction (Tr, 1/5/01, p 326, 783a).[6]

On January 30, 2001, the trial court signed an order encompassing its oral rulings. The order recited that, for the reasons stated on the record, the plaintiffs' motion for a preliminary injunction was denied. The order called for a dismissal of the plaintiffs' case in its entirety. (Order, 1/30/01, 788a).

Following the trial court's entry of its January 30, 2001 order, the plaintiffs timely filed their claim of appeal. After briefing and oral argument, the Michigan Court of Appeals reversed the trial court's ruling in favor of defendants on the basis that the plain language of MEPA provides the plaintiffs with standing to pursue this action. (Opinion, 2, 791a). Relying on *Ray v Mason County Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975) and *Stevens v Creek*, 121 Mich App 503, 507; 328 NW2d 672 (1982), the Court of Appeals declined to "read in an additional requirement of compliance with non-statutory standing prerequisites." (Opinion, 2, 791a). In essence, the Court of Appeals held that the plaintiffs could proceed under MEPA despite their failure to show

[6]The trial court also concluded that plaintiffs failed to make a prima facie showing that defendants' conduct polluted, impaired, or destroyed, or was likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources (Tr, 1/5/01, p 325, 782a).

actual injury as defendants had argued they were required to do under Michigan's Constitution and under this Court's decision in *Lee*. The Court also rejected the narrowing construction urged by defendants as a way to avoid the constitutional issue.

From that ruling, the defendants sought leave to appeal seeking either a grant of leave or peremptory reversal and the reinstatement of the trial court's summary disposition order in favor of defendants. This Court granted their application "limited to the issue whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726 (2001)." (Order, 7/3/03, 792a).

SUMMARY OF THE ARGUMENT

Michigan's Constitution embodies a bedrock separation-of-powers principle that prevents courts from undertaking tasks assigned to the political branches of government. Const 1963, art 6, vests the judicial power in the courts. It provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

The Michigan Constitution vests the executive power in the governor. Const 1963, art 5, § 1. And it vests the legislative power in a senate and a house of representatives. Const 1963, art 4, § 1. After having vested each branch of government with different powers, the Michigan Constitution expressly directs that the powers of the legislature, the executive, and the judiciary should be separate. Const 1963, art 3, § 2. Underscoring the importance that the drafters placed on the separation of powers, the Michigan Constitution explicitly prohibits any person exercising the powers of one branch from exercising those properly belonging to another branch. The text provides:

> The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

These provisions, like those in the United States Constitution, form the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by statutory language purportedly entitling any person to sue. Thus, the Legislature cannot confer

standing on any person in the absence of a showing that the person satisfies the judicial test for standing.

The constitutional constraints upon the judiciary's powers to render decisions about executive or legislative actions are significant protections in our system of government. In light of these separation-of-powers principles, the Court of Appeals should have accepted defendants' contention that MEPA cannot be read as allowing suit in the absence of a showing of actual injury because such a construction renders the provision unconstitutional. The plaintiffs argued, and the Court of Appeals agreed, that because Michigan's Constitution does not contain the words "case" and "controversy," no standing doctrine is constitutionally required for a litigant to bring an action in Michigan's courts. This represents a grave misunderstanding of the separation of powers mandated by Michigan's Constitution. It contradicts this Court's discussion in *Lee*, which recognized the constitutional underpinnings to the standing doctrine and acknowledged the need "to be vigilant in preventing the judiciary from usurping the powers of the political branches." *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 740; 629 NW2d 900 (2001).

MEPA's "any person may maintain an action" language must be read to incorporate the constitutionally-required "actual injury" showing that is the core component of the standing doctrine. Because the Court of Appeals erroneously ruled that the plaintiffs may proceed with their MEPA lawsuit without any showing of actual injury, this Court should reverse the Court of Appeals decision and reinstate the trial court's summary disposition order in favor of defendants.

ARGUMENT

CAN THE MICHIGAN LEGISLATURE CONFER BY STATUTE STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING AS RECOGNIZED BY THIS COURT IN *LEE V MACOMB COUNTY BOARD OF COMMISSIONERS*

A. Standard Of Review.

The question of whether a party has standing is a question on law, *Lee v Macomb County Bd of Comm'rs*, 446 Mich 726; 692 NW2d 900 (2001). An appellate court reviews questions of law de novo, *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000); *TIG Ins Co v Dept of Treasury*, 464 Mich 548; 629 NW2d 402 (2001).

B. The Standing Doctrine Is An Essential Element In Ensuring That Power Of The Three Branches Are Separated As Is Required By Michigan's Constitution.

Montesquieu provided the classical formulation of separation-of-powers and liberty:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor. [C. Montesquieu, *The Spirit of the Laws* 202 (D. Carrithers ed 1977) (T. Nugent trans 1st ed 1750).]

Another early thinker, George Lawson, laid the foundation for Locke's Second Treatise on Government, a work that was important to the thinking of this country's founders. See Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L J 449, 459 (1991). Earlier thinkers, such as Montesquieu, had emphasized the importance of dividing judging from the legislative and executive powers. Lawson divided the notion of execution of the laws into "'acts of Judgment'—hearing and decision of cases upon evidence—and 'execution.'" *Id.* quoting George Lawson, *Politica Sacra et Civilis*, at 41-56 (London 1660). This division was later embodied in Locke's theory emphasizing the separation of powers, which proposed a division of power between three branches of government. *Id.* quoting Locke at 350-351.

These separation-of-powers notions found their way into many state constitutions and were a critical element of the Founders' discussions about the structure of government that was eventually adopted in the United States Constitution. Martin S Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725, 1764-1771 (1996). According to Montesquieu, "legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to make peace or war and to establish public security; judicial power entailed punishing criminals and resolving disputes between individuals." Flaherty, citing Montesquieu, *The Spirit of the Laws* 151 (T Nugent trans 1949).

State constitutions that were developed later than the 1770s put these separation-of-powers principles increasingly into practice. Flaherty at 1764-1770. Virginia's

Constitution illustrates the embodiment of separation-of-powers principles in a constitutional text by mandating a formalistic division between branches:

> The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time.... [Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm & Mary L R 211 (1989) citing 7 F. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 1687 (1909).]

Like the United States Constitution, and many other state constitutions, the Michigan Constitution establishes three distinct departments of government and grants to each the responsibility for exercising one of the three major types of governmental power. Compare US Const, art I, § 1; art II, § 2; art III, § 1 with Const 1963, art 4, § 1; art 5, § 1; art 6, § 1; and art 3, § 4. Michigan's Constitution also requires that the powers be separately exercised by the distinct branches of government. Const 1963, art 3, § 2.

The doctrine of standing originates in a proper understanding of a key phrase included in both the United States and Michigan's constitutions. Each of these documents vests "judicial power" with the judiciary. Madison observed that the jurisdiction to be given to the federal courts should be limited to matters of a "judiciary nature." 2 *Records of the Federal Convention of 1787*, at 430 (Max Ferrand ed 1966). This limitation inhered in the distinction between judicial power on the one hand, and executive or legislative power on the other. Judicial power was inherently limited because "courts could not act on their own initiative but only at the request of a party in a public 'judicial' proceeding ... and judges had the authority to expound existing law, not

to make new law." Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L R 393, 426-427 (1996). The Framers "deliberately excluded judges from compulsory participation in making or executing federal law." Pushaw citing 2 Jonathon Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 514 (1901).

Although this limitation is often traced to the "case" or "controversy" language of the United States Constitution, it inheres in the notion of "judicial power," which is vested in one branch, the judiciary. Thus, the absence of the words "case" or "controversy" in Michigan's constitution does not change the proper separation-of-powers standing analysis. Standing has been described as having "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v Morton*, 405 US 727, 731; 92 S Ct 1361, 1366; 31 L Ed 2d 636 (1972). The standing doctrine restricts lawsuits to "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Muskrat v. United States*, 219 US 346; 31 S Ct 250; 55 L Ed 2d 246 (1911). See also, James T. Barry, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U Chi L R 235, 253-254 (1989) (rejecting proposal for judicial involvement in council of revision because it would lead to judicial dominance of executive branch). Madison explained that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." James Madison, 1 Annals of Cong 463 (Gales & Seaton eds 1978). Thus, the standing doctrine maintains

this constitutional architecture by limiting the judiciary's role to exercising "judicial power," and not power that is essentially legislative or executive in nature.

A proper understanding of judicial power elucidates the constitutional underpinnings for the standing doctrine. A court "decides, determines, and adjudicates, establishes, and fixes legal relations between contesting parties." Edwin Borchand, *Declaratory Judgments*, 8 (Banks-Baldwin Law Publishing Co 2d ed 1941). The "power to render judgments, the so-called 'judicial power,' is the power to adjudicate upon contested or adverse legal rights or claims, to interpret law, and to declare what the law is or has been." *Id.* at 8-9. The judgment "confers on the successful party certain powers and privileges, its recording gives official certification to a pre-existing legal relation (or establishes a new one on pre-existing grounds), and it affords an authoritative protection and guaranty to challenged, endangered, or contested rights." *Id.* at 10. It is the judgment that "constitutes the essence of judicial power." *Id.* For over a hundred years, courts have recognized that "the party seeking legal protection must have a sufficient interest to invoke the judicial process. *Id.* at 15, 29-30, 33-56. Thus, when declaratory judgments were first allowed by statute, both the United States Supreme Court and state courts held that litigants seeking such a judgment were nevertheless obligated to present the court with concrete legal issues presented in an actual case involving substantial controversy. See e.g. *Golden v Zwickler*, 394 US 103, 108; 89 S Ct 956; 22 L Ed 2d 113 (1969) (conjectured allegations not enough to constitute a substantial controversy between parties with real, immediate, and adverse legal interests). As Montesquieu long

ago explained, judicial power is power exercised to punish criminals and resolve disputes between individuals.

This case falls at the heart of these limits on the judiciary's exercise of executive power and presents the Court with the opportunity to clarify the standing doctrine as it applies to MEPA and the Legislature's right to confer standing on a litigant. Standing is not an ingenious academic exercise in the conceivable, *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). The doctrine assures that the "courts exercise power 'only in the last resort, and as a necessity,' and only when adjudications consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L R 1219, 1223-1224 (1993) quoting *Allen v Wright*, 468 US 737, 752; 104 S Ct 3315; 92 L Ed 2d 556 (1984). Standing is a threshold requirement to any suit. *Haskell v Washington Twp*, 864 F2d 1266, 1275-1276 (CA 6, 1988).

Generally, in order to have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected, *House Speaker v Governor*, 441 Mich 547, 554; 495 NW2d 539 (1993). A plaintiff shows a personal stake in a lawsuit by demonstrating that the plaintiff has been injured, *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). The "injury in fact" test requires more than an injury to a cognizable interest, "it requires that the party seeking review be himself among the injured," *Sierra Club v Morton*, 405 US 727; 92 S Ct 1361, 1366; 31 L Ed 2d 636 (1972). The alleged injury must be legally and judicially cognizable.

Raines v Byrd, 521 US 811, 858; 117 S Ct 2312; 138 L Ed 2d 849 (1997). In other words, the plaintiff must have suffered the invasion of a legally protected interest which is concrete and particularized and the dispute must be one traditionally thought to be capable of resolution through the judicial process.

Whether a party has a sufficient stake in an otherwise justiciable controversy in order to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution, *Lee* quoting *Daniels v People*, 6 Mich 381, 388; 1859 WL 5177 (1859), and *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884). Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy, *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992). To satisfy the requisite showing of standing, a party must demonstrate that it has a substantial interest that will be detrimentally affected in a manner distinct from that of the citizenry at large. A plaintiff's suit is properly precluded if its interests are no different than those of the public *Id.*

In the federal court system, the core component of standing is an essential and unchanging part of Article III of the United States Constitution, *Lujan, supra*. More particularly, the United States Constitution's limitation on the exercise of federal judicial authority emanates from art III, § 2, *Friends of the Earth, Inc v Laidlaw Environmental*

Services, 528 US 167; 120 S Ct 693; 145 L Ed 2d 610 (2000). It has been said that Article III requires a live contest in which to test legal differences, Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv L R 1002, 1006 (1924).

Those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III by alleging standing, *City of Los Angeles v Lyons*, 461 US 95; 103 S Ct 1660; 75 L Ed 2d 675 (1983). That means that a plaintiff must demonstrate a personal stake in the outcome in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions, 103 S Ct at 1665. Under such an approach, abstract injury is not enough. *Id.* A plaintiff must show that it sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Id.* The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth v Laidlaw Environmental Services*, 528 US 167; 120 S Ct 693, 704; 145 L Ed 2d 610 (2000).

Standing serves as a means of resisting judicial intrusion into the operations of the other branches of government. Antonin Scalia: *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 Suffolk U L R 881 (1983). The standing doctrine is, according to Justice Scalia, a critical and inseparable element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *Id.* Under the doctrine of the separation of powers, each branch of

government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

If the Constitution has vested all executive power in the president (or governor) and executive branch, then the Legislature has no right to diminish this authority. Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541 (1994) quoting James Madison, 1 Annals of Cong 463 (Gales & Seaton eds 1789). The powers were "vested" in a particular branch. See generally Steven G. Calabresi, T*he Vesting Clauses as Power Grants*, 88 NW U L R 1377 (1994). Thus, the separation-of-powers doctrine stems from the language in art III, § 1 which announces that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Likewise, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." US Const, art I, § 1. And "the executive power shall be vested in a President of the United States." US Const, art II, § 1. The text vests specific kinds of powers in distinct branches of government. These vesting clauses, as much as the terms "case" or "controversy," are responsible for empowering the judiciary, and simultaneously limiting it to the exercise of power that is judicial in nature.

The adjective "executive" comes from the verb "to execute," which means to perform or put into action. The president is constitutionally vested with the power to put federal law into effect. Calabresi & Prakash at 580. As the founders intended, the executive branch is responsible for executing the laws. *Id.* at 617-622. When the

government executes a law, an individual "who is the very object of the law's requirement or prohibition seeks to challenge it, he always has standing." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L R 881, 894 (1983).

But when, as here, the plaintiff is complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else," there is, according to Justice Scalia, a serious interference with the executive power. *Id.* In *Lujan*, writing for the Court, Justice Scalia explained that in this second case, the litigation risks a transfer of the executive power from the executive branch to the judiciary. *Lujan*, 112 S Ct at 2137-2140. The constitution vests in the president the power to ensure that the laws are executed, Congress may not, therefore, transfer this authority to the judiciary. If the legislative branch can turn an "undifferentiated public interest in the executive officers' compliance with the law into an 'individual right' vindicable in the courts," it would be transferring from the president to the courts, the executive branch's "most important constitutional duty," the duty of executing the laws. *Lujan*, 112 S Ct at 2145.

These concerns led the *Lujan* court to reject citizen standing on the basis of a Congressional grant unless the plaintiff could show actual injury. Similarly, the Supreme Court, in *Schlesinger v Reservists Committee to Stop the War*, 418 US 208; 94 S Ct 2925; 41 L Ed 2d 706 (1974), held that standing to sue may not be predicated upon an interest held in common by the public at large but must be predicated upon concrete injury, actual or threatened. The *Schlesinger* court explained that permitting suit in those circumstances would "distort the role of the Judiciary in its relationship to the Executive

and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" 94 S Ct at 2933. According to *Schlesinger*, this flows from our system "of government [which] leaves many crucial decisions to the political processes." *Id.* The Constitution did not "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts"; it "created a representative Government" with citizens having the "right to assert [their views in the political forum or at the polls." *US v Richardson*, 418 US 166; 94 S Ct 2940; 41 L Ed 2d 678 (1974).

Likewise in *Steel Co v Citizens for a Better Environment*, 523 US 83; 118 S Ct 1003, 1009; 140 L Ed 2d 210 (1998), the Supreme Court rejected an organization's efforts to litigate because the organization "seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the undifferentiated public interest in faithful execution of EPCRA." 118 S Ct at 1018. This was not enough to create standing but merely underscored the separation-of-powers problem raised by such suits. In *Steel Co*, the Court grounded its rejection of citizen-standing on the redressibility requirements. *Id.* at 1072. The same separation-of-powers theme can be readily seen, regardless of the prong of the standing doctrine on which the court relies.

Lujan similarly taught that a citizen suit provision cannot confer standing to sue in the absence of the traditional showing. 504 US at 573. According to *Lujan*, if the courts ignore the concrete injury requirement "at the invitation of Congress," they would be ignoring "one of the essential elements ... that are the business of the courts rather than

of the political branches." *Id.* at 576. Standing cannot be satisfied by a "congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan*, 504 US at 573. The plaintiff must show that the violation of the statute endangers a concrete interest that is more than simply execution of the law.

This standing doctrine stems, at least in part, from Madison's notion that the judiciary's power would be limited because its authority was well confined within "landmarks," that were more certain than those limiting the activities of the other two branches. *The Federalist* No. 48 (James Madison), reprinted in *James Madison: Writings* (Jack N. Rakove ed 1999) at 216. These constitutional constraints have prompted the Supreme Court to rule that the "judicial power" does not encompass claims based on abstract interests or lawsuits seeking to attack claimed illegal action by one of the non-judicial branches of government unless the claim is accompanied by a concrete impairment of protected interests. See e.g. *Simon v Eastern Ky Welfare Rights Organization*, 426 US 26, 40-42; 96 S Ct 1917; 48 L Ed 2d 450 (1976); *Worth v Seldin*, 422 US 490, 498-499; 95 S Ct 2197; 45 L Ed 2d 343 (1975); *Laird v Tatum*, 408 US 1, 13-16; 92 S Ct 2318; 33 L Ed 2d 154 (1972); *Sierra Club v Morton*, 405 US 727, 734-736; 92 S Ct 1361; 31 L Ed 2d 636 (1971); *Valley Forge Christian College v Americans United For Separation of Church and State*, 454 US 464, 485-486; 102 S Ct 752; 70 L Ed 2d 700 (1982). Recently, when addressing the Legislature's power to confer standing on an individual, the Supreme Court remarked, "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff

who would not otherwise have standing." *Raines v Byrd*, 521 US 811; 117 S Ct 2312, 2318 n 3; 138 L Ed 2d 849 (1997).

These concerns are at their height when the legislature encroaches on other branches because the Framers cautioned that "[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments." *The Federalist* No. 49, at 259 (Max Beloff 2d ed 1987). Thus, courts have been careful to scrutinize legislative efforts to weaken the powers of the executive branch by assuming executive powers or by transferring them to the judiciary or to some other entity. See e.g. *Myers v United States*, 272 US 52; 47 S Ct 21; 71 L Ed 2d 160 (1926); *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976); *INS v Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1982). Long ago, James Madison announced the principle that controls here:

> If the Constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority.... [1 Annals of Cong 463 (Gales & Seaton eds, 1789) quoted in Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541, 54 (1994).]

Madison proposed in 1789 that a new article by added to the original Constitution:

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed; so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments. [12 *The Papers of James Madison* 202 (C. Hobson & R. Rutland eds, 1979).]

This provision was adopted by the House but defeated in the Senate. Rebecca L. Brown,

Separated Powers & Ordered Liberty, 139 U Pa L R 1513, 1539, n 116-117 (1991).

But similar provisions were included in many state constitutions. See discussion in Gerald Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm & Mary L R 211, 217-220 (1989). Thus, state constitutions with such provisions present an even stronger basis for enforcing separation-of-powers principles than does the federal constitution. Michigan has such a provision.

C. The Michigan Constitution Requires Judicial Enforcement Of The Standing Doctrine.

1. Michigan's Constitutional Test Supports The View That The Legislature May Not Confer Standing To A Litigant Who Fails To Satisfy The Judicial Test For It.

In Michigan, as in the federal court system, standing is of great consequence, *Lee v Macomb County Bd of Comm'rs, supra*. In fact, the *Lee* court cautioned that neglect of standing principles would imperil the constitutional architecture whereby governmental powers are divided amongst the three branches of government in Michigan (*Id.*). The *Lee* court went on to explain that standing is a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches of government. The courts provide relief to claimants who have suffered or will imminently suffer actual harm. It is not the role of the courts, but rather that of the political branches of government, to shape the institutions of government in such a fashion as to comply with the laws and the constitution.

Notwithstanding the absence of the language comprising art III of the United States Constitution in Michigan's Constitution, standing in Michigan has developed on a

track parallel to the federal doctrine, *Lee, supra*. The constitutional underpinning of Michigan's standing requirement is Const 1963, art 6, § 1 which vests the judicial power in the courts. That text provides:

> Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Additionally, Const 1963, art 3, § 2 expressly directs that the powers of the legislature, the executive, and the judiciary should be separate:

> Sec. 2. The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

As the *Lee* court emphasized, a concern with maintaining the separation of powers, as in the federal court system, has caused the Michigan courts over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches and vice-versa.

Adherence to the constitutional underpinnings of standing does not allow for deviation from these rules.[7] To confer jurisdiction on any individual who asserts a

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[7]Michigan's Constitution explicitly lifts the normal standing requirements to allow the judiciary to consider selected matters. See e.g. Const 1963, art 2, § 8 (allowing for either house of the legislature or the governor to request an opinion on important questions or law "as to the constitutionality of legislation after it has been enacted into law but before its effective date"); Const 1963, art 9, § 32 (granting standing to any taxpayer suing to enforce the provisions of the Headlee Amendment). But none of these constitutionally granted standing provisions apply here.

hypothetical or speculative environmental harm is contrary to constitutionally-based standing requirements under state law. *Lee, supra.* Thus, it is without merit to propose that the Legislature could, in part 17 of MEPA, MCL 324.1701, confer universal standing in the absence of actual injury. It could not.

2. MEPA Cannot Be Read To Confer Universal Standing Without Regard To The Judicial Standing Doctrine.

MEPA provides for declaratory and equitable relief in favor of a litigant who makes a prima facie showing that a natural resource is involved and that the effect of the activity in question on the environment rises to a level of impairment that will justify the relief, *City of Portage v Kalamazoo Co Road Comm'n*, 136 Mich App 276, 280; 355 NW2d 913 (1984) and *State Hwy Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). In particular, MCL 324.1701(1) reads as follows:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

The plaintiffs proposed and the Court of Appeals agreed to read the "any person" language of MEPA so as to confer standing on them notwithstanding their inability to articulate anything more than speculative and hypothetical injury.

This broad reading cannot result in the creation of universal standing without a showing of actual injury and the other components of the judicial test for standing. *Lee, supra.* Contrary to the Court of Appeals decision, MEPA should not be read to provide for a universal grant of standing because notions fundamental to the tripartite structure of

our government mandate a rejection of this position. As acknowledged by the *Lee* court, Michigan conforms the scope of its judicial function to the Article III model. Under that scheme, standing serves as a gatekeeper to the state courthouse. It determines whether, when, and by whom important questions can be adjudicated. In the federal system, standing defines the work of Article III courts and marks the boundary between the worlds of law and politics, Jan Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan L R 169, 170 (1968) and Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L J 679, 688 (1997). It properly serves that role in Michigan as well.

Michigan judges must conform their role to Article III limits because the federal model reflects the proper measure of adjudicative function, *Connecticut Ass'n of Health Care Facilities v Worrell*, 508 A2d 743, 746 (Conn, 1986); *Stewart v Bd of County Comm'rs*, 573 P2d 184, 186 (Mont, 1977); and *Parker v Town of Milton*, 726 A2d 477, 480 (Vt, 1998). By adopting the federal *Lujan* test for standing, Michigan stands in agreement with these courts, *Lee, supra*. Thus, it is fair to say that Michigan imports into its judicial system the standing rules associated with Article III. The Court of Appeals decision cannot withstand scrutiny when viewed in light of *Lee* and the *Lujan* standing doctrine this Court there embraced.

3. Case Or Controversy Language Is Not Required Given The Constitutional Text Vesting Judicial Power In The Judiciary And Mandating The Separation of Powers.

Michigan's constitution encompasses both language investing the "judicial power" of the state in the courts and a separation-of-powers provision. See Const 1963, art 6,

§ 1; Const 1963, art 3, § 2. Thus, the judiciary is constrained to the exercise of only "judicial power." The judiciary may perform only acts of a judicial nature and not those that might be executive or legislative. Michigan courts have also found in the text a bar preventing other bodies from exercising judicial power. See e.g. *Streeter v Paton*, 7 Mich 341; 1859 Mich LEXIS 67 (1859) (examining whether proceeding that took place in chambers amounted to exercise of judicial power); *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8; 153 NW 49 (1915) (rejecting constitutional challenge to administrative body on the basis that it exercised judicial power where action was preparatory to an order or judgment to be rendered by a different body and thus not judicial); *Dearborn Twp v Dail*, 334 Mich 673; 55 NW2d 201 (1952) (considering whether ordinance vesting justices of peace with judicial power when they were also members of township legislative bodies was permissible). Michigan courts have distinguished "judicial power" from "legislative" or "executive" power in order to determine whether powers of one branch have been improperly given to another branch to exercise. See e.g. *People v Piasecki*, 333 Mich 122; 52 NW2d 626 (1952); *Sharp v Genesee County Clerk*, 145 Mich App 200; 377 NW2d 389 (1985); *In re Southland*, 298 Mich 75; 298 NW2d 457 (1941); *Soap & Detergent Ass'n v Natural Resources Comm'n*, 415 Mich 728; 330 NW2d 346 (1982).

Michigan courts have defined the "judicial power" as "the power to decide cases between contending parties and to determine legal rights in other cases where permitted by law. *Wayne Circuit Judges v Wayne Co*, 383 Mich 10, 18-19; 172 NW2d 436 (1969). Long ago, the noted jurist, Justice Cooley explained:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third, must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others." [*Dearborn Twp v Dail*, 334 Mich 673; 55 NW2d 201, 205 (1952).]

From this notion, Michigan courts have concluded that the vesting of "judicial power" into the courts limits them to judicial conduct. The standing doctrine, as embraced in *Lee*, gives effect and meaning to this limit. The legislature may not constitutionally empower the judiciary to consider and decide cases not traditionally involving the exercise of judicial—as opposed to legislative or executive—power. In other words, it may not confer standing in the absence of a showing that the litigant satisfied the traditional judicial test for it.

Other state courts have similarly looked to the notion of "judicial power" to limit the cases the judiciary may consider. In Oregon, for example, the Supreme Court examined a provision in a statute that purportedly allowed a challenge to the statute's constitutionality without any showing that the plaintiff had a justiciable claim. *Oregon Medical Ass'n v Rawls*, 281 Ore 293; 574 P2d 1103 (1978). The Oregon Supreme Court held that the proceeding was "not within the judicial power" because the judicial power did "not extend to quiet anyone's title to the constitutional validity of a statute against the world at large." 281 Ore at 296, 302.

Similarly, the Nevada Supreme Court defined judicial power as "the capability or potential capability to exercise a judicial function," or "the authority to hear and determine justiciable controversies." *Galloway v Truesdell*, 83 Nev 13; 422 P2d 237, 242 (1967). The Nevada Supreme Court struck down a statute because it granted non-judicial powers to district courts and therefore violated the implied limitations on the law-making authority that were inherent in the specific grants of legislative, executive, and judicial power to different branches of government. See also *Hymes v Aydelott*, 26 Ind 431 (1866) (rejecting challenge to statute because it did not confer judicial power on supervisors). Other state courts have also looked to the definition of "judicial power" and the text of constitutional separation-of-powers provisions to ensure that the branches of government do not intrude on each other, striking down statutes that purport to empower one branch to exercise power properly belonging to another. *Lewis v Webb*, 3 Me 326 (Me, 1825); *Iowa v Keasling*, 442 NW2d 118 (1989); *Howe v Dunlap*, 12 Okla 467; 72 P 895 (1903); *Tindal v Drake*, 60 Ala 170 (1877); *City of New Orleans v United Gas Pipe Line Co*, 438 So 2d 264 (1983); *Green v Secretary of State*, 27 NC App 605; 220 SE2d 102 (1975). The Illinois Supreme Court, for example, defined judicial power as "the power which adjudicates upon the rights of citizens and to that end construes and applies the law." *Id.* at 504. The Illinois Supreme Court then employed this definition of judicial power when considering the scope and limits of legislative action. *People v Joseph*, 113 Ill 2d 36; 495 NE2d 501 (1986).

Like these sister courts, Michigan's courts have given meaning to the constitutional text embodied in art 6, § 1 and art 2, § 3 to limit the proper scope of the

three branches of government and to ensure that they exercise those powers and only those powers that are appropriate given the constitutional text and its organizational scheme. As part of this process, the *Lee* court embraced the *Lujan* standing doctrine. Under this doctrine, a litigant may not sue without showing a personal stake in the outcome. Because this standing doctrine is an essential constitutional requirement embodied within the three part government, the Legislature may not confer standing in the absence of the judicial test including actual injury.

4. The Arguments Presented Below Provide No Basis For Allowing The Legislature To Confer Standing Without A Showing That The Litigant Can Satisfy The Judicial Standing Test.

A concern that environmental laws may not be implemented and enforced by the executive branch is no proper basis for abandoning all standing requirements. To do so threatens the careful balance established between three distinct and separate branches of government. It is to allow the Legislature to intrude into the proper sphere of the executive branch by foisting onto the judiciary the role of second-guessing executive administrative decisions in the absence of a justiciable dispute. It would have this Court condone legislative encroachment upon the other branches by pulling the judiciary into constant dispute with the executive branch when no justiciable dispute has yet arisen. Standing rules are essential to keeping the role played by the judiciary within its constitutional boundaries. Standing rules must be applied even if a statute gives citizens a right to sue to enforce the statute. Under such a scenario, there must still be an injury in fact, and not just an abstract or conjectural wrong.

Under normal principles of statutory interpretation, a statutory grant of a right to sue should be construed in a manner consistent with constitutional limitations, including those stemming from the separation-of-powers provision of Michigan's Constitution. See e.g. *Defenders of Wildlife v Hodel*, 851 F2d 1035, 1045 (CA 8, 1988) rev'd sub nom *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (Bowman, J., dissenting) (declining to "attribute to congress the unexpressed intent to dispense with standing requirements entirely... Surely Congress did not intend this provision to be read in a vacuum, without regard to constitutional limitations.") rev'd sub nom *Lujan v Defenders of Wildlife, supra*. The Court of Appeals erred in reading MEPA to dispense with standing requirements and to permit plaintiffs to proceed without regard to constitutional limitations.

The different branches of government play unique and disparate roles. It is a distortion of the separation-of-powers theme to give all power to one branch of government at the expense of the others. Inherent in our structure of government is the notion that judicial power belongs to the judiciary, legislative power belongs to the legislature, and executive power is wielded by the executive. Responsibilities charged to one branch of government are not properly foisted on another. Every time the notion of standing is expanded, the remaining branches of government also act to diminish the power of the executive branch. A reduction in standing requirements allows expanded challenges to the adoption and/or implementation of decisions by the executive. Likewise, an expansion of the jurisdiction of a court to second-guess the executive branch's execution of the law may amount to a transfer of power from the executive to

the judiciary. The legislature may not constitutionally transfer powers from one branch to another. See generally, Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 Suffolk U L R 881 (1983). Manipulation of standing rules disrupts the balance of power so critical to the principle of separation of powers on which Michigan's government rests.

Not surprisingly, the plaintiffs do not address the ramifications of their position advocating universal standing for persons pressing MEPA claims. While they propose that theirs is a more environmentally-friendly approach, their claims rings hollow inasmuch as it fails to take into account the critical constitutional structure of our State government and the ramifications of the argument on the separation-of-powers doctrine. For that reason, it must be said that the trial court properly determined that the plaintiffs did not possess the requisite standing to pursue their MEPA claim. The Court of Appeals erred in reversing the trial court's ruling.

The plaintiffs do not have a personal stake in the outcome of this lawsuit. They have failed to demonstrate any direct injury or injury in fact that would confer standing on them. At best, the plaintiffs have alleged only potential environmental harm to general use and enjoyment of the property surrounding the impact area. The harms asserted are insufficient to create standing under MEPA. Thus, the Court of Appeals erred in allowing them to proceed with their MEPA claim.

The mere assertion of environmental harm cannot and should not operate to confer standing on a person either under the common law or under any statutory scheme. The affidavits submitted by Messrs. Allen, Fries, and Myers on behalf of plaintiffs articulate

only general concerns for the protection of the environment as a whole and do not rest upon any type of immediate, personal injury to the affiants. These are not the functional equivalent of an assertion of actual and immediate harm to their legitimate interests. Accordingly, *Lee* and the Michigan Constitution mandate that litigants bringing MEPA claims satisfy traditional actual-injury standing requirements.

In *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975), a case of first impression dealing with the interpretation of MEPA, this Court unequivocally stated that MEPA "provides private individuals and other legal entities with standing to maintain actions in the circuit courts for declaratory and other equitable relief," 393 Mich at 307. But that aspect of the *Ray* court's discussion was unnecessary to the decision, and mentioned as part of a lengthy recitation of the MEPA's requirements and provisions. The plaintiffs in that case included seventy percent of the landowners in the watershed purportedly affected by the drain commissioner's project. In addition, six persons whose interests were not specifically identified joined the suit. Even if those six lacked standing, the landowners in the affected watershed could readily pass constitutional muster under an actual injury standing. Nowhere in the decision is there a suggestion that MEPA dispensed with actual injury standing requirements. Instead, the *Ray* court simply observed in passing that the "Act provides private individuals and other legal entities with standing to maintain actions in the Circuit Court for declaratory and equitable relief against anyone for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction." *Ray*, quoting MCLA 691.1201(1). That brief discussion in no way

suggests that this Court intended to abrogate Michigan's standing doctrine or to interpret MEPA to dispense with a showing of actual injury. Thus, it provides no proper basis for ruling in favor of the plaintiffs. Moreover, to the extent this Court reads *Ray* to pose an obstacle to enforcing standing requirements, it should be overruled.

Likewise, *Stevens v Creek*, 121 Mich App 503; 328 NW2d 672 (1982), lends no support to the Court of Appeals' decision in this case. *Stevens* did not involve a plaintiff who lacked actual injury. The plaintiff was the owner of a parcel of property that had allegedly been trespassed on when the defendant purportedly cut down and removed timber from the land. Although the *Stevens* court recited that the same language from § 2 of MEPA as did *Ray*, it did not discuss standing, or address any challenge based on the absence of actual injury.

Neither *Ray* nor *Stevens* resolved the issue presented here. The final authority that the Court of Appeals relied on, *In Re MCI Telecommunications Complaint*, 460 Mich 396; 596 NW2d 164 (1999), merely was cited for the proposition that statutes are construed in accordance with their plain meaning; the decision has nothing to do with the standing issue presented here.

In short, there is no basis for upholding the Court of Appeals decision that dispensed with the necessity for demonstrating standing. The Court of Appeals should be overruled because the Michigan Legislature cannot confer standing on a litigant when the litigant fails to satisfy the judicial test for standing.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to MCR 7.214(E)(2) defendants-appellants hereby request that this Court docket this appeal for oral argument.

Oral argument will afford defendants appellants' counsel the opportunity to address any questions that the Court may have concerning any complexities of the lower court record and the specifics of the parties' respective positions on appeal. Counsels' participation in oral argument will enable them to succinctly place their positions before this Court. It is defendants-appellants' belief that oral argument is necessary and will benefit all involved and that the decisional process will be significantly aided by this Court's allowance of oral argument.

See generally, Chief Judge Merritt's comments in *Judges on Judging: The Decision Making Process in the Federal Courts of Appeals*, 51 Ohio St L J 1385, 1386 (1990), wherein he stated, "At its core, the adversary process is oral argument."

RELIEF

WHEREFORE, Defendants-Appellants, The Cleveland Cliffs Iron Company and Empire Iron Mining Partnership, by and through its attorneys, Plunkett & Cooney, P.C., respectfully request that this Court reverse the Court of Appeals' decision and reinstate the Marquette County Circuit Court's January 30, 2001 order dismissing plaintiffs' case in its entirety based on plaintiffs' lack of standing.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

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